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Supreme Court, U. S.
F I L E D
FEB 13 1998
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No. 96-1866

In The
Supreme Court of the United States
October Term, 1997

ALIDA STAR GEBSER and
ALIDA JEAN MCCULLOUGH,

Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

**BRIEF AMICI CURIAE OF
TASB LEGAL ASSISTANCE FUND**
Texas Association of School Boards,
Texas Association of School Administrators, &
Texas Council of School Attorneys, et al.

IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Nearly 750 public school districts in Texas are members of the TASB Legal Assistance Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The TASB Legal Assistance Fund is governed by three organizations: The Texas Association of School Boards (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA). The Texas Association of School Boards (TASB) is a non-profit unincorporated association of the public school districts of the State of Texas. Approximately 1047 public school districts in the state, through their elected boards of trustees, have joined as members of TASB. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE ANN. §§ 11.151(b), (d) (Vernon 1996). The Texas Association of School Administrators (TASA) represents the state's school superintendents and other administrators who are responsible for carrying out the education policies adopted by their local boards of trustees. The Texas Council of School Attorneys (CSA) is composed of attorneys who represent more than 90% of the public school districts of Texas.

The Arizona School Boards Association is a non-profit corporation, whose membership is composed of the governing boards of 217 of Arizona's 225 public school districts.

The Arkansas School Boards Association is a non-profit organization whose membership consists of all the 311 school districts in Arkansas.

The membership of the Idaho School Boards Association is responsible for the education of more than 95% of Idaho's public school children. The Association has 109 as members and serves 562 individual trustees.

No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

The Indiana School Boards Association is a non-profit association consisting of all 290 reorganized public school boards in Indiana. Its purpose is to promote the efficient and effective administration and operation of the public school corporations in the state.

The New York State School Boards Association is a not-for-profit corporation whose statutory purpose is to devise "practical ways and means for obtaining greater economy and efficiency in the administration of public school district affairs and projects" on behalf of public school districts in New York.

118 of the 119 local boards of education in North Carolina belong to the North Carolina School Boards Association, which exists to serve these boards as they set the policies that govern the education of more than the one million students who attend the public schools in the state.

The Ohio School Boards Association is a non-profit organization created for the purpose of assisting Ohio boards of education in matters relating to the conduct and operation of the public schools of that state. Although membership is voluntary, 100% of the city, county, local, exempted village and joint vocational school districts throughout the state of Ohio are members of the Ohio School Boards Association.

The Oklahoma State School Boards Association, Inc. is a private 501(c)(3) nonprofit association whose membership consists of more than 98% of the boards of education of public school districts in the State of Oklahoma. The Association's membership is responsible for the education of more than 98% of the state's public school children.

The Tennessee School Boards Association is a not-for-profit organization whose mission is to assist Tennessee's school boards in effectively governing public school systems.

The Wyoming School Boards Association was formed to serve as a collective voice for school boards throughout the state and to provide local boards of education with the specialized information they need to operate Wyoming's public schools in the most efficient and effective way possible.

The TASB Legal Assistance Fund and the other associations listed above urge this Court to uphold the decision of the court below. While school districts continually strive to prevent sexual harassment and sexual abuse of their students, a standard of liability that would increase their exposure to litigation and liability would do little to eradicate the problem. In fact, the standard of liability Petitioners propose could impede school districts' ability to develop effective sexual harassment prevention programs by diminishing school district resources. The actual knowledge standard developed by the court below, on the other hand, ensures that victims of teacher-student sexual abuse are compensated if the abuse results from school district action, but denies such damages if the school district neither caused nor facilitated the abuse. This standard thus strikes a balance between efforts to prevent sexual harassment and the realistic constraints on school districts' ability to eliminate sexual harassment and abuse completely.

STATEMENT OF THE CASE

Amici incorporate by reference the statement of the case contained in Respondent's brief.

SUMMARY OF THE ARGUMENT

Title IX was enacted to deter sex discrimination by educational institutions. This Court has determined that sexual harassment is a form of sex discrimination and

that victims of sexual harassment by educational institutions may recover monetary damages under Title IX. While Petitioners would have this Court look at Title IX with blinders on, we suggest the Court consider the interaction of this statute's standard of liability with other laws. In particular, we encourage the court to consider Section 1983 and the case law developed under it, which addresses the circumstances under which governmental entities can be liable for the very same harm. An actual knowledge standard similar to the deliberate indifference concept in constitutional cases provides the most appropriate standard for analyzing teacher-student sexual harassment and sexual abuse claims brought under Title IX. Not only would it align constitutional jurisprudence with Title IX case law, thus allowing for consistent imposition of liability on governmental entities, it would also provide the best solution from a public policy standpoint: school districts would still have incentive to take preventive measures but would not face potentially crippling liability if those preventive measures fail. As much as public school officials deplore sexual abuse of students, there is no way for school districts to guarantee that sexual harassment or sexual abuse will never occur. Further, vicarious liability does little to promote preventive efforts. An actual knowledge standard, on the other hand, limits unwarranted liability while promoting preventive efforts.

ARGUMENT

I. Title IX liability should be imposed only when an educational institution has actual knowledge that a teacher is sexually harassing or sexually abusing a student.

A. Title IX, a Spending Clause statute, has a limited purpose and scope.

As this Court has recognized, Title IX was enacted to accomplish two objectives: (1) to avoid the use of federal

resources to support discriminatory practices; and (2) to protect individual citizens from those discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 705, 99 S. Ct. 1946, 1961 (1979).¹ Accordingly, when a recipient of federal funds discriminates on the basis of sex, it violates Title IX. This Court has further determined that sexual harassment is a form of sex discrimination. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76, 112 S. Ct. 1028, 1037 (1992).² But while Title IX is an important piece of legislation, designed to provide nondiscriminatory opportunities in education, it was not designed as a "cure-all" for all types of discrimination. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1014 (5th Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 165 (1996). Nor could it have been intended, by Congress or this Court, to establish in Title IX, a spending statute, substantive rights greater than those protected by the Fourteenth Amendment to the U.S. Constitution. Petitioners propose a standard of liability, however, that would make Title IX much more protective than the Constitution.

B. *Franklin v. Gwinnett* did not articulate nor imply a standard of liability for actions brought under Title IX; it held only that an action for money damages exists for violations of Title IX.

In *Franklin v. Gwinnett*, this Court cited *Meritor Sav. Bank F.S.B. v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399 (1986), a case involving sexual harassment in the workplace and arising under Title VII. *Franklin*, 503 U.S. at 76,

¹ While we do not agree with the result in *Cannon*, we do not challenge its validity here.

² This decision is cited for the purposes of argument only, for we are not convinced that sexual abuse is a form of discrimination based on sex.

112 S. Ct at 1037. Little could this Court have predicted that in citing *Meritor* for the limited proposition that sexual harassment is a form of sex discrimination, many lower courts would interpret this reference to mean that Title VII standards dictate the outcome of Title IX cases. See, e.g., *Brzonkala v. Virginia Polytechnic Inst.*, No. 96-1814, 1997 WL 7855239 (4th Cir. Dec. 23, 1997); *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 514 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Lipsett v. Univ. Of Puerto Rico*, 864 F.2d 881, 899-900 (1st Cir. 1988). This overly simplistic conclusion is not supported by the language of Title IX, Congressional intent, or public policy. What these courts have failed to understand is that this Court merely referenced Title VII in *Franklin v. Gwinnett* for the limited purpose of determining whether sexual harassment is the equivalent of sex discrimination. Three circuit courts of appeals have recognized as much and have declined to apply Title VII standards in Title IX teacher-student sexual abuse cases. See, e.g., *Floyd v. Waiters*, No. 94-8668, 1998 WL 17093 at *2 (11th Cir. Jan. 20, 1998) (adopting Fifth Circuit's rejection of various potential theories of liability, including Title VII); *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1034 (7th Cir. 1997); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 656-658 (5th Cir. 1997). In so holding, they have refused to impose institutional liability based on a single act of one of the entity's employees. Yet under Petitioners' proposed standard of liability, institutional liability would be premised not on the acts of the educational institution itself, but on a single, unauthorized act of one of its employees. This Court now has the opportunity to clarify the seemingly broad language of *Franklin v. Gwinnett* and ensure that Title IX cases are resolved in a manner consistent with legislative

intent, legislative history, and with this Court's consistent treatment of public educational institutions.

C. The standard for determining liability under Title IX should be comparable to the standard used for determining liability under Section 1983.

Although this Court has yet to address the issue, many circuit courts have recognized that sexual abuse of a student by a school teacher acting under color of state law violates that student's right to bodily integrity under the substantive due process clause and is therefore actionable under Section 1983. See, e.g., *Doe v. Claiborne*, 103 F.3d at 506; *P.B. v. Koch*, 96 F.3d 1298, 1302 (9th Cir. 1996); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-454 (5th Cir. 1994) (en banc); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 726 (3d Cir. 1989). Students who suffer such violations, like the harm alleged in this case, should be required to pursue their cause of action under the standards similar to those articulated in Section 1983 jurisprudence.

1. The plain language of Title IX prohibits discrimination by "educational institutions"; it makes no mention of educational institutions' employees.

Title IX prohibits discrimination by educational institutions. Accordingly, "institutional misconduct is the basis for institutional liability." *Floyd v. Waiters*, No. 94-8667, 1998 WL 17093 at *4. Under Title IX, this "institution" is the "local educational agency," which is defined as "the public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools. . . ." 20 U.S.C.

§§ 1687(2)(B), 8801(18). The Eleventh Circuit Court of Appeals reasoned that this definition would not allow institutional liability to be premised on an employee's knowledge of sexual harassment; rather, it could be based only on knowledge by those authorized to act on behalf of the district. In the case before the Eleventh Circuit Court, state law indicated that the school board and the superintendent were authorized to take actions on behalf of the school district.³ The fact that a person occupying a lower position in the district had notice of sexual harassment, the court concluded, would not impute liability to the district:

We do not think that school districts, in reality, have actual knowledge – the knowledge to support potentially million-dollar liability for the school district – whenever, for example, a deputy assistant director of transportation (but no one higher-up) may know that a bus driver is harassing someone or the foreman (but no one higher-up) of the district's emergency plumbing crew has knowledge of misconduct, and these supervisors could fire (but do not) the harassers.

Floyd, 1998 WL 17093 at *8, n.9. The 11th Circuit thus recognized, as this Court should, that liability for Title IX violations must be based only on actions of the entity.

2. Like Title IX, Section 1983 requires action by the entity.

In order to establish government liability under Section 1983, a plaintiff must show that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

³ In Texas, the school board "has the exclusive power and duty to govern and oversee the management of the public schools," TEX. EDUC. CODE ANN. § 11.151(b) (Vernon 1996); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241 (5th Cir. 1993).

said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't. of Social Servs. of N.Y.*, 436 U.S. 658, 695, 98 S. Ct. 2018, 2037-2038 (1978). This approach ensures that liability is based on actions of the entity: "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Board of County Commissioners of Bryan County v. Brown*, ___ U.S. ___, 117 S. Ct. 1382, 1388 (1997) (citing *Monell*, 436 U.S. at 698, 98 S. Ct. at 2027). Additionally, institutional liability under Section 1983 may be based on the decision of someone with final policymaking authority. *Bryan County v. Brown*, ___ U.S. ___, 117 S. Ct. at 1389; *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241 (5th Cir. 1993). Liability for constitutional violations, therefore, is premised on actions of the governmental entity, not on actions of its employees. As Title IX has a similar focus on the institution, rather than employees, a similar standard should apply. If a similar standard were used in Title IX teacher-student sexual harassment cases, liability would be based, as the language of Title IX contemplates, on the actions of the "educational institution."

3. Actual knowledge is similar to deliberate indifference.

Under an actual knowledge standard, an educational institution would be found to discriminate on the basis of sex when it had actual knowledge that a school district employee was sexually harassing, abusing, or otherwise discriminating against a student and failed to take action to stop the offensive activity. Continuing with the Section 1983 analogy, "actual knowledge" is the substantial

equivalent of "deliberate indifference." Deliberate indifference can be established by showing that: (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) this failure caused a constitutional injury to the student. *Doe v. Taylor*, 15 F.3d at 454; *see also*, *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 760 (5th Cir. 1993) (holding that the school board did not ignore or turn a blind eye to accusations that a teacher sexually abused students, when the school board investigated the alleged incidents and reassigned the teacher; the board may have been negligent, but as the board had virtually no proof that the teacher had touched a student in an inappropriate manner, the board had not acted with deliberate indifference); *see also*, *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 645 (8th Cir. 1990). Accepting "actual knowledge" as similar to "deliberate indifference," a school district will be liable under Title IX when it consciously disregards or is deliberately indifferent to sexual harassment of students by school district employees. *Seamons v. Snow*, 84 F.3d 1226, 1235 (10th Cir. 1996); *Doe v. Taylor*, 15 F.3d at 453 (explaining that a governmental entity cannot supervise its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens). Deliberate indifference is relevant, the Fifth Circuit Court has explained, because it "highlight[s] the distinction between an intentional wrong and a wrong that flows from mere neglect." *Rosa H.*, 106 F.3d at 659 (citing *Farmer v. Brennan*, 511 U.S. 825, 843-844, 114 S. Ct. 1970,

1978-1980 (1994) for its definition of deliberate indifference). The same rationale applies with even greater force in the Title IX context, due to the statute's specific focus on the institution. "Actual knowledge" in Title IX actions will function just as the deliberate indifference standard has in Section 1983 actions. Such indifference, disregard, or actual knowledge can be established by showing that a school district knew of a danger of harassment and chose not to alleviate that danger. *Rosa H.*, 106 F.3d at 659.

In keeping with this Court's interpretation of deliberate indifference, the actual knowledge standard will not mean that a plaintiff will recover only when a school board takes official action or adopts a policy that clearly discriminates on the basis of sex. A governmental custom, practice, or policy can be informal, implicit, or based on the entity's failure to act in the face of obvious violations. *Rizzo v. Goode*, 423 U.S. 361, 371, 96 S. Ct. 598, 604 (1976). Nor would an actual knowledge standard mean that widespread abuses would have to be shown before finding liability. Under Petitioners' theory, however, a school district would be liable simply because it employed a tortfeasor – and nothing more. This Court has not allowed vicarious liability for constitutional violations. Certainly, it cannot intend for the same harm to be remedied through vicarious liability under Title IX, a Spending Clause statute. By its terms, Title IX reflects Congress's intent for educational institutions to be liable for their own illegal acts; however, Congress did not obligate educational institutions to control the unauthorized conduct of others. *See Bryan County, ___ U.S. ___,* 117 S. Ct. at 1388 (citing *Pembaur v. City of*

Cincinnati, 475 U.S. 469, 479, 106 S. Ct. 1292, 1298 (1986)).⁴ The actual knowledge standard is preferable because it prevents plaintiffs from skirting the requirements of *Monell* and its progeny to recover monetary damages for harm that could be remedied through Section 1983. In addition, it prevents Title IX from becoming a federal law of *respondeat superior*.

- a. **An actual knowledge standard will not negate school districts' responsibility, nor will it encourage districts to ignore instances of sexual harassment and sexual abuse.**

Petitioners suggest that an actual-knowledge standard would negate school districts' responsibility and encourage them to turn a blind eye toward sources of sexual abuse. Petitioners' brief at 34. This argument fails for two reasons. First, individual supervisory officials may be held personally liable for sexual abuse committed by their subordinates under Section 1983; thus, they have an intense personal interest in ensuring that they follow up on the slightest suspicion that a school district employee may be sexually abusing a student. *Doe v. Taylor*, 15 F.3d at 454; see, also, *Jane Doe "A" v. Special School Dist.*, 901 F.2d at 645. Second, the school district itself may be liable under both Title IX and Section 1983. See, e.g., *Doe v. Taylor*, 15 F.3d at 443 (recognizing that a governmental entity is liable under § 1983 if it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens); *Rosa H.*, 106 F.3d at 652-3 (articulating actual knowledge standard

⁴ While this case interprets the language of Section 1983, it provides guidance here, since neither Section 1983 nor Title IX contain language that requires control of another.

for determining school district liability in Title IX teacher-student sexual harassment cases). Therefore, school districts will adopt policies and implement procedures requiring investigation of and responses to allegations of sexual harassment or sexual abuse.

- b. **Agency principles will not increase vigilance.**

Petitioners and their *Amici* argue that the Office for Civil Rights' 1997 Guidance, which incorporates agency principles, is necessary to ensure school districts' vigilance. Brief of United States at 20; Petitioner's Brief at 36-38; U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12039 (1997). Their argument ignores the very real standards under which school districts and school officials already operate – the duty not to be deliberately indifferent to the constitutional rights of students to be free from sexual abuse by a teacher. See, e.g., *Seamons v. Snow*, 84 F.2d 1226, 1234 (10th Cir. 1996); *Doe v. Taylor*, 15 F.3d at 454. Just as the deliberate indifference standard encourages districts to protect against constitutional violations, the actual knowledge concept encourages prevention of Title IX violations.⁵ Moreover, "school

⁵ At least one court has interpreted the actual knowledge standard very broadly. See *Mary M. v. North Lawrence Community Sch. Corp.*, 131 F.3d 1220, 1225 (7th Cir. 1997) (holding that principal had actual knowledge of sexual harassment when he overheard a cafeteria employee and a student planning to miss school on the same day.) Such an interpretation hardly permits districts to turn a blind eye to potential sexual harassment or sexual abuse of a student by a teacher. But even under the definition of actual knowledge applied in *Mary M.*, Lago Vista ISD would not be liable for Frank Waldrop's sexual abuse of Gebser, for it had absolutely no hint such a relationship was occurring.

boards that adopt a head-in-the-sand policy would be foolish indeed, morality aside, because they would encounter liability under 42 U.S.C. § 1983." *Rosa H.*, 106 F.3d at 658. Petitioners' theory, on the other hand, would expose educational institutions to vicarious liability for all acts of their employees – a result this Court has been unwilling, thus far, to impose on governmental entities.

Given the legal incentive that already exists, in the form of the deliberate indifference and actual knowledge standards, to prevent sexual harassment and sexual abuse, Petitioners' proposal to apply Title VII and agency standards is unnecessary. Deliberate indifference, a standard that has been working to protect constitutional rights for years, already demands that school districts prevent sexual discrimination. Cases decided since the facts in this case arose have strengthened this incentive and will work to minimize future instances of similar injuries. *See, e.g., Doe v. Taylor*, 15 F.3d at 454 (articulating test for determining individual supervisory liability under Section 1983); *Rosa H.*, 106 F.3d at 658 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases); *Smith*, 128 F.3d at 1034 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases); *Floyd*, 1998 WL 17093, at *4 (adopting actual knowledge standard in Title IX teacher-student sexual abuse cases). Actual knowledge will adequately protect students from discrimination by encouraging school districts to take preventive measures: Title IX liability will be found if the school district actually knew of a substantial risk that students would be sexually harassed and failed to respond. *Rosa H.*, 106 F.3d at 659. School districts are already working to prevent sexual

abuse and sexual harassment that could lead to constitutional injury. In the process, they are preventing, to the extent possible, violations of Title IX.⁶

4. Applying agency or agency-like principles to Title IX actions would contravene Congressional intent and the principles this Court articulated in *Monell*.

a. The Title VII constructive notice standard should not be transferred to Title IX cases.

Despite Title IX's focus on the entity, rather than employees, Petitioners would have this Court articulate a standard of liability that is based on principles developed under Title VII and agency law. Title VII and Title IX have a common feature – both prohibit discrimination on the basis of sex – but the similarity ends there. Title VII was directed primarily at the private sector; Title IX on the other hand, applies primarily to public institutions, which, unlike private employers, must respect rights

⁶ At the time the events in question arose, school district liability for sexual harassment or sexual abuse under Title IX was a relatively undeveloped area of the law. Furthermore, only the Third Circuit, in *Stoneking*, 882 F.2d at 726, had recognized a cause of action for sexual abuse against students under Section 1983. Since that time, this area of the law has exploded, providing school districts with additional guidance and increasing awareness of sexual harassment as a systemic problem. *See, e.g., Doe v. Claiborne*, 106 F.3d at 506; *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995) (recognizing that an individual's substantive due process right to bodily integrity was much clearer in 1987 than the Title IX "right" allegedly violated); *Doe v. Taylor*, 15 F.3d at 454.

established by the United States Constitution.⁷ Furthermore, the language of Title VII specifically mentions employees as agents, while Title IX contains no such references.⁸ The absence of such language in Title IX indicates that Congress did not intend for employees to be part of the Title IX framework.⁹ School districts should not, therefore, be held to a constructive notice standard under Title IX.

b. Applying pure agency principles to Title IX would create a federal law of *respondeat superior*.

This Court has consistently refused to apply *respondeat superior* in Section 1983 cases because neither the language of Section 1983 nor the legislative history reflect

⁷ We realize, of course, that Title IX applies to all types of educational institutions, but for the purposes of our discussion, we focus on public institutions.

⁸ Title VII provides in part, that an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person. (emphasis added)." 42 U.S.C. § 2000e(b). Title IX contains no parallel language.

⁹ In fact, Title VII standards would merely increase the confusion that already exists with respect to Title IX. See *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535 (11th Cir.), cert. granted, 118 S.Ct. 1530 (1997) (noting the differing approaches used in the circuits to determine liability for hostile environment sexual harassment cases under Title VII and citing cases); see, also, *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 492-493 (7th Cir. 1997) (en banc), cert. granted sub nom, *Burlington Industries v. Ellerth*, No. 97-569, 66 U.S.L.W. 3490 (Jan. 23, 1998) (expressing its inability to forge a majority position with regard to evaluating an employer's liability for sexual harassment by a supervisory employee).

any intent to create a federal law of *respondeat superior*.¹⁰ Similarly, neither the language nor the legislative history of Title IX support the application of agency principles. *Smith*, 128 F.3d at 1023-31; *Rosa H.*, 106 F.3d at 654-7. Moreover, Congress surely never intended for Title IX, enacted under the Spending Clause, to confer greater protection, by way of a lower standard of liability, than Section 1983, which provides a mechanism to redress rights established by the U.S. Constitution. Finally, to analyze Title IX violations under a standard lower than that applied in Section 1983 cases would allow plaintiffs to recover for similar harm while evading the requirements this Court set out in *Monell*. Applying an actual knowledge standard in Title IX teacher-student sexual abuse cases will properly resolve these actions by allowing for consistent treatment of governmental entities regardless of the legal theory used: *respondeat superior* will not apply in the case of alleged constitutional violations, nor will it apply to alleged violations of Title IX. The actual knowledge standard, therefore, would allow meritorious Title IX claims to be redressed without allowing evasion (and ultimately, erosion, at least in teacher-student sexual abuse cases) of the principles set forth in *Monell*.

¹⁰ While Petitioners and OCR may sidestep use of the term "*respondeat superior*," in effect that is the standard they are trying to impose – making the acts of teachers the responsibility of the school district. 62 Fed. Reg. at 12039.

5. **School districts have no affirmative duty to prevent constitutional harm under the Fourteenth Amendment, nor should such a duty be read into Title IX.**

Petitioners assert without citing legal authority that Title IX imposes a duty upon school districts to protect students from sexual abuse and ensure a school environment free of discrimination. Petitioner's Brief at 16, 23. In essence, the Office for Civil Rights (OCR) in its Policy Guidance has also tried to impose such a duty.¹¹ In support of this position, Petitioners cite *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986), an inapposite case regarding school districts' authority to limit students' free speech rights.¹² *Bethel* did not, contrary to Petitioners' inferences, create a duty to protect, nor should such a duty be read into Title IX. This Court has established that the state has a constitutional duty to protect citizens from harm only in very limited circumstances. *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998 (1989). The lower courts have been careful to rule within these well-established limits and have held that compulsory attendance laws do not create an affirmative duty to protect students while at school. See, e.g., *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412 (5th Cir. 1997) (en banc); *Seamons v. Snow*, 84 F.3d at 1236; *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. by L.R. v. Middle Bucks Area Vo.*

¹¹ OCR's Policy Guidance does not carry the force of regulation. The Guidance states that its purpose is to provide information to educational institutions so that they are better able to identify, prevent, and address sexual harassment. 62 Fed. Reg. at 12039.

¹² The United States, as *amicus* for petitioners, makes essentially the same argument. Brief of United States at 23-24.

Tech. School, 972 F.3d 1364, 1368-73 (3d Cir. 1992) (en banc); *J.O. v. Alton Community Unit School Dist.* 11, 909 F.2d 267, 272 (7th Cir. 1990). If no affirmative duty to protect against constitutional injury exists under the Fourteenth Amendment, should such a duty be inferred in Title IX? Neither the statutory language nor its legislative history support such a conclusion. Title IX confers a limited benefit: students will not be discriminated against on the basis of sex by educational institutions. Title IX does not, however, require that educational institutions guarantee an environment completely free of any acts of sexual harassment or abuse. Congress surely did not intend to require school districts to protect students from all instances of sexual discrimination when those occurrences are unauthorized, unsanctioned, and uncontrollable. If it had intended such broad coverage, the language of the statute would have reflected that intent.

6. **A school district should not be liable for a teacher's sexually abusive acts simply because it has not complied with the nominal terms of the Title IX regulations.**

Petitioners contend that a school district should be strictly liable for sexual harassment or sexual abuse if the district has not complied with Title IX's requirement to adopt a written policy. This approach is unsupported by sound legal reasoning, public policy rationale, or simple logic: "failure to adopt a Title IX grievance policy is not itself an act of discrimination based on sex." *Seamons v. Snow*, 84 F.3d at 1233; see also, *Faragher v. City of Boca Raton*, 111 F.3d at 1539, n.11 (finding that the City's failure to effectively disseminate sexual harassment policy was not the reason the City did not know about the harassment.) Furthermore, it is completely conceivable that a school district could fail to complete a "Title IX"

policy, yet still have some extremely effective practices for preventing sexual discrimination and sexual harassment. The absence of a Title IX policy, therefore, should result in liability only when the lack of such a policy manifests a deliberate or conscious choice by the school district to disregard sexual harassment of students by employees *and* the lack of a policy is causally connected to the alleged harm. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206 (1989). Just as having a policy that follows Title IX requirements to the letter will not insulate a school district from liability for money damages, failure to have such a policy should not, without more, automatically lead to money damages.

A school district's failure to adopt a Title IX policy may constitute a minor violation of one of the Department of Education's Title IX regulations. The remedy for such a minor infraction is found within the Department of Education's own regulations. See, 34 C.F.R. § 74.62 (describing enforcement procedures to be used when recipient fails to comply with terms and conditions of an award.) The suggestion that money damages should be the remedy for such noncompliance is unwarranted. Furthermore, if this standard of strict liability were adopted, Title IX would become one of the most protective statutes in our country – more protective than the U.S. Constitution, through section 1983, more protective than any other statute enacted under the Spending Clause, and surely more protective than Congress ever intended.

D. An actual knowledge standard of liability preserves the tradition of not awarding punitive damages against a governmental entity.

Typically, victims of sexual harassment do not suffer a loss of wealth; while they may suffer emotional or

psychological harm that deserves compensation, the primary purpose of damages in these cases is to punish the discriminator, not to compensate the individual. *Jansen*, 123 F.3d at 510 (noting that victims of sexual harassment generally do not suffer loss of wealth) (Manion, J. and Posner, C.J., concurring and dissenting). Under a negligence or vicarious liability standard, however, school districts and other educational institutions would be punished for the malicious acts of their employees. This result would contradict the courts' tradition of declining to impose punitive damages on governmental entities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260, 101 S. Ct. 2748, 2756 (1981). We recognize that Title IX damages are not purely punitive and so do not ask this Court to reverse its decision in *Franklin v. Gwinnett* and disallow monetary damages completely. We do, however, suggest that limiting monetary damages to cases in which educational institutions are shown to have actual knowledge, and thus in some way have taken part in the sexual harassment, will ensure that damages that are at least partially punitive in nature are awarded only when appropriate. The standards Petitioners suggest, on the other hand, would disregard the common law tradition of not awarding punitive damages against governmental entities; it would serve ultimately to punish only the taxpayers, who took no part in committing the sexual harassment. *City of Newport*, 453 U.S. at 267, 101 S. Ct. at 2759.

Of course, damages also serve a deterrent purpose. There is no reason to believe, however, that the increased number of damage awards that would inevitably result from a negligence or vicarious liability standard would allow school districts to better control misfeasance by their employees. As this Court has stated, "it is far from clear that municipal officials, including those at the

policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality." *City of Newport*, 453 U.S. at 268, 101 S. Ct. at 2760. The misconduct of teachers, therefore, will not be deterred simply because their employer faces possibly large monetary penalties. The real deterrent exists when individuals can be held liable for the acts of their subordinates, as would be the case under Section 1983. *See, e.g., Doe v. Taylor*, 15 F.3d at 454 (establishing test for assessing supervisory liability in teacher-student sexual abuse cases). Followed to its logical conclusion, this line of reasoning demands that damages be awarded against an educational institution only when the institution knowingly allows sexual harassment to occur. Actual knowledge, therefore, emerges as the most appropriate standard to apply in cases of teacher-student sexual harassment or sexual abuse brought under Title IX.

II. Petitioner's standard of liability would subject school districts to potentially devastating monetary damages.

A. The statute itself makes no mention of liability.

Because the Court determined in *Cannon*, 441 U.S. 677, 99 S. Ct. 1946, that Title IX is enforceable through an implied right of action, the statute "contains no whisper of liability," nor any mention of liability, for that matter. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996). And since it makes no reference to liability, logically it contains no limits on the award of damages. While many courts have chosen to analogize Title VII and Title IX, as discussed earlier, this overly simplistic view is supported by neither the language of the statutes nor by any public policy rationale. Although applying Title VII

standards may seem initially attractive, when it comes to damages, there is an important factor that distinguishes Title VII from Title IX: Title VII limits the size of damage awards. Private employers, therefore, may be liable for discriminatory practices, but the extent of that liability is limited. Under Title IX, however, there is no such limitation. Just as there is no evidence in the statutory language that Congress intended to subject school districts to liability based on the unauthorized acts of employees, it is equally hard to believe that Congress intended to provide greater protection to private employers than to the nation's public school districts. To accept Petitioners' proposed standard of liability would subject school districts to potentially devastating damage awards. Witness the jury award of \$1.4 million awarded against one school district at the district court level. *Leija v. Canutillo Indep. Sch. Dist.*, 887 F. Supp. 947, 955 (W.D.Tex. 1995), *rev'd*, 101 F.3d 393, 399 (5th Cir. 1996). In later reducing the jury award, the judge recognized that the strict liability he had imposed had the potential for "massive awards." In fact, he stated, "even rich districts would be strapped by a verdict of \$1.4 million." *Id.* at 955. In that particular case, the already financially poor school district eventually prevailed on appeal, but the cost of litigating the case (not to mention fighting another legal battle with the insurance company over coverage for the costs of defending the case, *Canutillo Indep. Sch. Dist. v. National Union Fire Insurance Co.*, 99 F.3d 695 (5th Cir. 1996)) surely drained that school district's educational funds. Ultimately, our children and our taxpayers pay the price in the form of higher tax bills and fewer resources for public education. As one court has recognized: "[t]here is no sound policy reason to hold a school district financially accountable, through strict liability, for the criminal acts of its teachers. . . . As horrible a crime as child abuse is,

we do not live in a risk-free society; it contorts "public policy" to suggest that communities should be held financially responsible in this manner (strict liability) for such criminal acts of teachers." *Canutillo*, 101 F.3d at 399. School districts find sexual harassment and sexual abuse as reprehensible as do Petitioners. But the standard Petitioners propose, and the remedy they seek, will only harm students who will lose the full benefits of already limited educational budgets.

B. An actual knowledge standard would not discourage meritorious actions; however, it would help prevent the onslaught of claims that a lower standard would undoubtedly provoke.

Franklin v. Gwinnett spawned hundreds of lawsuits against school districts alleging sexual harassment and/or sexual abuse. In Texas alone, for example, and looking only to those cases that have been reported or otherwise brought to our attention, more than 20¹³ court actions have been filed against school districts alleging violations of Title IX. **Marsh v. Dallas Indep. Sch. Dist.*, 129 F.3d 612 (5th Cir. 1997) (unreported opinion); **Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412; **Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223 (5th Cir. 1997); **Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997); **Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393; **Bowles v. Floresville Indep. Sch. Dist.*, 84 F.3d 432 (5th Cir. 1996) (unreported opinion); **Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996);

¹³ This estimate does not include currently pending cases, nor does it include all unreported decisions or those that may have been settled or otherwise disposed of prior to final adjudication.

Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994); *Piwonka v. Tidehaven*, 961 F. Supp. 169 (S.D. Tex. 1997); **Doe v. Bridgeport Indep. Sch. Dist.*, No. Civ. A. 3: 94-CV-1889D, 1997 WL 279142 (N.D. Tex. May 14, 1997) (unreported opinion); *Doe v. Bridgeport Indep. Sch. Dist.*, Civ. A. No. 3: 94-CV-1889D, 1996 WL 734949 (N.D. Tex. Dec. 11, 1996) (unreported opinion); *J.W. v. Bryan Indep. Sch. Dist.*, No. H-93-3790 (S.D. Tex. 1995) (unpublished order); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437 (S.D. Tex. 1994).¹⁴ Multiplying the Texas estimate by the 50 states results in a conservative estimate of the number of cases brought under Title IX in the five years since *Gwinnett* was decided. Adopting the liberal standard advanced by Petitioners would do little to stop sexual harassment but would definitely encourage more lawsuits against school districts. These lawsuits, regardless of their merit, must be defended – an activity that not only consumes scarce school district dollars but also takes educators away from their educational duties. Public school students thus suffer twice – in the form of reduced funding for educational programs and in the form of less time with their valued educators. The threat of litigation is already very real; adopting a standard based on actual knowledge will ensure that school districts comply with Title IX but are not continually defending lawsuits. We respectfully request, therefore, that the Court narrow its holding in *Franklin* to require actual knowledge before monetary damages will be available.

By narrowing the scope of *Franklin* to allow money damages only when the district itself has actual knowledge of sexual discrimination, this Court will do a great service to this country's students, its school districts, and

¹⁴ *For brevity's sake, we cite only the most recent, appellate disposition of these cases.

its taxpayers. Furthermore, it will ensure that school districts themselves do not become insurers against sexual abuse: "Strict liability converts the school district from being the educator of children into their insurer as well. And, if it is their insurer, it is most arguable that its role as educator – needed now more than ever – will suffer, and suffer most greatly." *Canutillo*, 101 F.3d at 400. From a public policy perspective, therefore, vicarious liability would exact a substantial toll on the nation's public schools.

C. Despite their best efforts, school districts cannot guarantee that sexual abuse will not occur.

As some astute courts have recognized, despite the best efforts of school districts, there is no way to guarantee that sexual abuse will never occur.¹⁵ And as Petitioners so aptly point out, sexual abuse is, by its very nature, illicit, hidden, difficult to detect. Often, both parties to a sexual relationship – the teacher and the student – vehemently deny any suggestion of such a relationship. School districts do screen and monitor their employees. School officials also regularly seek and receive training

¹⁵ In *Jansen v. Packaging Corporation of America*, 123 F.3d at 511, the en banc court struggled to define an employer's liability under Title VII for both quid pro quo and hostile environment harassment. In a concurring and dissenting opinion, Chief Judge Posner and Judge Manion pointed out that strict liability would not promote the goal of deterring sexual harassment, as it would require an employer to go to "extreme expense and greatly [curtail] the privacy of its employees, as by putting them under continuous video surveillance. . . . [A] law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits." Moreover, under a strict liability standard, employers might just rather pay the occasional judgment to incurring costs arising from attempts to prevent sexual harassment.

on addressing and preventing sexual harassment. But the inherent unpredictability of human nature makes it impossible to predict with perfect accuracy which employee might sexually harass a student.¹⁶ Consequently, Petitioners' proposed standard of liability will do little more than increase the number of claims against school districts; it will not, on the other hand, enable school districts to prevent or eliminate sexual harassment by school district employees. In this case, Petitioners suggest that the school district could have prevented Gebser's harm, but they present no evidence that Frank Waldrop had any criminal background or other history that would have alerted Lago Vista ISD to the possibility that he would engage in sexual relations with a minor student. Petitioners suggest that Waldrop's "inappropriate comments" should have provided sufficient notice to the district, but what would they suggest the district should have done? The principal responded by questioning Waldrop about these comments and directed him to refrain from using such language in the future. Realistically, there was little more that could have been done at that time. Furthermore, it is often difficult to obtain

¹⁶ Although examining a Title VII cause of action, the 7th Circuit recently struggled with establishing a standard for employer liability and recognized that employers simply cannot eliminate sexual harassment entirely: "It is facile to suggest that employers are quite capable of monitoring a supervisor's actions affecting the work environment. Large companies have thousands of supervisory employees. Are they all to be put under video surveillance? Subjected to periodic lie-detector tests? Trained on business trips by company spies?" *Jansen*, 123 F.3d at 513 (Manion, J. and Posner, C.J., concurring and dissenting). And by the way, who is watching the person watching the surveillance monitor?

complete and accurate histories of teachers' past performance.¹⁷ Petitioners ignore the reality of operating a school district: teachers (such as the one involved in this case) are employees with contractual, statutory, and constitutional rights. In many situations, especially in ones similar to the present case, a school district's figurative hands are tied – with such a minor infraction, it has no basis for any permanent disciplinary action. Could a few “inappropriate comments,” which did not even rise to the level of profanity, constitute the “good cause” necessary to terminate a contractual employee? Not before a Texas hearing examiner, and probably not anywhere else in the United States.

Despite the fact that some instances of sexual abuse may be impossible to discover before it is too late, school districts constantly battle all forms of sex discrimination. To that end, numerous trainings, seminars, and in-services are conducted every year in an attempt to help school districts recognize, address, and prevent sexual harassment. In fact, training in recognizing and preventing sexual harassment and sexual abuse is the most requested training topic in Texas school districts and is certainly a “required course” for school officials throughout the country. The concerned professionals who direct the nation's school districts do not need a higher standard of liability to heighten their awareness of and interest in eliminating sexual abuse and harassment.

Finally, it is important to emphasize that Petitioners' standard of liability would do little to increase protection of students from sexual harassment; it would only

¹⁷ In Texas, for example, evaluations of teacher performance are confidential. TEX. EDUC. CODE ANN. § 21.355 (Vernon 1996). Furthermore, the fear of defamation claims often inhibits past employers from providing accurate references.

increase the amount of financial rewards they would receive if victimized. An actual knowledge standard may, on the other hand, further attempts to minimize the occurrence of sexual harassment. A school district can act to stop harassment or abuse only after it is aware of the harassment or abuse: “[R]equiring knowledge by the school district . . . as a condition to recovery of damages will result in much quicker and greater protection not only to the person being abused and providing notice, or on whose behalf it is given, but will also better protect or otherwise benefit those who may then be undergoing abuse from that, or another teacher.” *Canutillo*, 101 F.3d at 399. School districts do their best, and will keep doing their best, no matter the standard of liability. A standard like Petitioners propose will do little to eliminate sexual discrimination in schools. In fact, it would only exacerbate the financial difficulties already facing school districts across the nation. The cost of defending Title IX lawsuits would easily exceed the funding Congress sought to provide educational institutions by enacting Title IX in the first place. If strict liability or constructive notice were the rule, would school districts really have any incentive to try to prevent sexual harassment? In a moral sense, yes, they would continue to persevere. But in the legal sense, even their best efforts would not reduce their exposure to liability.

CONCLUSION

Petitioners are looking at Title IX in a vacuum. It is not the only means of preventing sexual harassment, nor is it the only means of obtaining a remedy for sexual harassment. In addition to state laws, the Constitution protects schoolchildren's right to be free from sexual abuse by a schoolteacher. And while standards for imposing constitutional liability are higher than the standard

Petitioners seek to impose, a standard at least as high as that used to assess constitutional liability would ensure that governmental entities, such as school districts, will not be subject to devastating damage awards for unauthorized, unknown acts of their employees. If increasing the number of damage awards would help increase school districts' ability to prevent sexual harassment or would provide some meaningful incentive to fortify prevention efforts, then perhaps such a measure would be warranted. But unfortunately, despite school officials' best efforts, sexual harassment and abuse will continue to occur, to some extent, no matter what steps are taken - such is the nature of the human condition. Requiring actual knowledge ensures that it is the acts of the educational institution, not the unauthorized acts of its employees, that result in liability. Not only is the actual knowledge standard supported by the language of Title IX, it is also supported by public policy and would align school district liability under Title IX with the standard for liability under Section 1983 for the very same harm.

Respectfully submitted,

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